

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

COMMONWEALTH EDISON COMPANY	:	
	:	
Petition for approval of tariffs	:	No. 06-0411
Implementing ComEd's proposed	:	
residential rate stabilization program	:	

**THE PEOPLE OF THE STATE OF ILLINOIS' REPLY
IN SUPPORT OF SUPPLEMENTAL MOTION TO DISMISS**

The People of the State of Illinois ("the People"), by and through the Illinois Attorney General, Lisa Madigan, file this Reply in support of the People's Motion to Dismiss, pursuant to 83 Ill. Admin. Code § 200.190(e). This Reply addresses the Response filed on August 24, 2006 by Commonwealth Edison Company ("ComEd"), which fails to refute the People's principal point: The Illinois Commerce Commission ("ICC" or "Commission") should dismiss ComEd's petition because ComEd's rate stabilization plan for residential customers ("RRS plan") is contrary to Illinois law.

I. Cap and deferral is prohibited by BPI II.

ComEd disputes the People's conclusion that ComEd's RRS plan is prohibited by Business and Professional People for the Public Interest, et al. v. Illinois Commerce Comm'n, 146 Ill. 2d 175, 585 N.E.2d 1032 (1991) ("BPI II"). ComEd Response, at 2 - 5. ComEd asserts that "[t]his claim is incorrect" and that the People recently "lost this identical claim"

in ICC Docket No. 06-0448. ComEd Response, at 2 and FN 2. Both of these assertions are wrong.

BPI II holds unambiguously that a utility cannot recover in rates operating expenses incurred in prior periods because such a scheme would result in a mismatch of expenses and revenues in violation of the test year principle, which requires rates to be calculated using a single year of expenses and revenues.¹ BPI II, 146 Ill.2d at 237 – 244. ComEd does not dispute that this. Indeed, ComEd expressly acknowledges that BPI II holds that utilities are prohibited from deferred recovery of “operating expenses” that are “subject to test year rules in ratemaking proceedings.” ComEd Response, at 2.

A. BPI II applies because in this case ComEd seeks approval to increase revenues

The applicability of BPI II to the facts of the instant case is clear. The carrying costs and implementation costs that ComEd seeks to collect through the proposed RRS program are operating expenses. Accordingly, under BPI II, these costs must be recovered during the accounting period in which the costs are incurred.

ComEd attempts to sidestep BPI II by asserting that the holding does not apply here because the instant case is a “rate design” docket rather than a ratemaking or revenue requirement proceeding. ComEd

¹ As discussed in more detail on pages 5-6, the test-year principle applies to ComEd’s cap and deferral proposal because ComEd is a “public utilit[y] as defined in Section 3-105 of the Public Utilities Act (Act) [220 ILCS 5/3-105] . . . that [is] subject to requirements of Section 9-201 of the Act [220 ILCS 5/9-201] and Ill. Adm. Code 285.83 Ill. Admin. Code § 287.10.

Response, at 3. That is factually incorrect. Com Ed also incorrectly asserts that the RRS proposal is “revenue neutral.”

In this case ComEd is seeking approval to increase its revenues by collecting additional operating expenses associated with the new RRS proposal (e.g., carrying costs and RRS implementation costs). Hence, BPI II applies. ComEd is unequivocally prohibited from recording these or other operating expenses in one year for recovery in a later year, as ComEd proposes to do in the RRS plan.

B. ComEd’s RRS petition should be dismissed based on the reasoning in ALJ’s Ruling in Docket No. 06-0448.

ComEd states that “Judge Jones’ ruling [in ICC docket no. 06-0448] correctly distinguishes between the question of ‘whether or to what extent . . . power supply costs may appropriately be recovered’ and a ‘proposal to phase in the impact of recovering costs whose quantification and underlying recoverability are approved elsewhere.’” ComEd Response, at 4, citing *Administrative Law Judge’s Amended Ruling*, ICC Docket No. 06-0448 (August 11, 2006). The People agree. However, contrary to ComEd’s assertions, the instant case is the former type of case not the latter.

In the instant case, ComEd seeks final approval to recover new operating expenses. Recoverability of RRS implementation costs and carrying charges has not been approved elsewhere. Therefore, based on Judge Jones’ ruling, BPI II applies.

In contrast, in Docket No. 06-0448, Ameren was “not even seeking final approval of its proposal unless and until certain legislation is enacted” and there was insufficient detail in the proposal to determine “whether certain costs are in fact in the nature of expenses.” (ALJ Ruling, at 8 and 9). The ALJ found that “strictly speaking, BPI II issues need not be decided at this time . . .” but nonetheless concluded that “based on the record as it currently exists . . . the Motion to Dismiss is denied without prejudice.”

ComEd’s RRS petition is clearly not “identical” to the Ameren petition in ICC Docket No. 06-0448. The ALJ’s ruling in that docket is not, as ComEd suggests, a basis for denying the People’s Motion to Dismiss in the instant case. On the contrary, ComEd’s RRS petition should be dismissed because, as ALJ Jones points out, BPI II applies where a utility seeks to recover costs that have not been approved elsewhere.

II. CUB v. ICC did not modify the holding in BPI II prohibiting deferred recovery of operating expenses in cases, such as this one, where test-year principles apply.

ComEd asserts that BPI II cannot be read to prohibit deferred recovery of operating expenses because the Supreme Court subsequently approved recovery, over a five year period, of coal tar cleanup expenditures at former sites of manufactured gas plants. ComEd Response, at 4, citing Citizens Util. Bd. V. Ill. Commerce Comm’n, 166 Ill.2d 111, 651 N.E.2d 1089 (1995)(“CUB v ICC”). This is incorrect.

CUB v. ICC was a case about amortized costs recovered over a five year period in which the Court specifically held that test-year rules *did not* apply. CUB v. ICC, at 121 – 125 and 139 – 140). In contrast, BPI II was a case in which deferred recovery of operating expenses was prohibited because the court held that test-year rules *did* apply. BPI II, at 139 – 140.

Test-year principles apply to proposals by “public utilities as defined in Section 3-105 of the Public Utilities Act (Act) [220 ILCS 5/3-105] . . . that are subject to requirements of Section 9-201 of the Act [220 ILCS 5/9-201] and 83 Ill. Adm. Code 285.” 83 Ill. Admin. Code § 287.10. In this docket ComEd clearly meets these requirements:

- ComEd is a public utility as defined in 3-105 of the Act.
- Section 9-201 of the Act applies whenever a public utility, such as Ameren, seeks to “change . . . any rate or other charge or classification or service...relating to or affecting any rate or other charge, classification or service....” 220 ILCS 5/9-201(a). In this case Section 9-201 clearly applies because ComEd seeks to change rates by reducing them in some years and increasing them in later years. Indeed, ComEd acknowledges that this section applies by expressly stating that the petition in this docket is filed “pursuant to Articles IX and XVI of the Public Utilities Act”. ComEd Petition, at 1.
- ComEd is subject to the requirements in Part 285 in this docket because, *inter alia*, ComEd’s cumulative filings over the previous 12 month period would increase ComEd’s overall revenues and revenues from service to residential customers by 1% or more. 83 Ill. Admin. Code § 120(a). ComEd’s request for an increase in delivery services rates was filed less than 12 months prior to ComEd’s RRS petition and seeks a rate increase that would increase ComEd’s overall revenues and revenues from service to residential customers by 1% or more. Docket No. 05-0597, tariff filed on August 31, 2005, case filed on September 14, 2005.

The instant case is, therefore, a case in which test-year principles apply. Consequently, BPI II prohibits deferred recovery of new operating expenses such as RRS implementation and carrying costs: “the test-year rules are intended to prevent a utility from mismatching revenue and operating expense data.” BPI II, 146 Ill.2d at 242.

III. The ICC has not approved deferred recovery of operating expenses since BPI II was decided.

ComEd states that “rate phase-in plans” have occasionally been considered in ICC cases since the Supreme Court’s decision in BPI II and also asserts that a “rate phase in plan” was actually adopted in ICC docket nos. 00-0233/00-0335 (cons.). ComEd Response, at 5.

However, as discussed below, the order that ComEd cites fails to provide *any* basis for approval of deferral proposals like the one that ComEd proposes. ComEd does not identify any cases where “rate phase-in plans” have been approved where, as here, the plan involves deferred recovery of operating expenses subject to test-year principles and an increase in the utility’s revenues.²

The ICC Order which ComEd wrongly cites as applicable precedent was issued on March 13, 2002 in Illinois Independent Telephone Association, docket no. 00-0233/00-0335 (cons.). ComEd Response, at

5. The “phase-in” in this telephone case involved the size of a subsidy

² ComEd is also incorrect when it asserts that this interpretation of BPI II “would appear to preclude the budget and deferred payment arrangements that the Commission has approved and in some instances mandated.” ComEd Response, at 5, FN 3. Budget billing and deferred payment programs are not revenue generators like the proposed RRS program, in which ComEd proposes to earn its cost of capital on the deferred charges.

that phone companies could draw from a Universal Service Fund. The “phase-in” involved decreasing a subsidy received from the Universal Service Fund, while increasing (dollar-for-dollar) the amount either received from customers or imputed to the carrier. The telephone companies’ total revenue per line per year was, therefore, unchanged. There was no deferral, no interest accrual, and no element of retroactivity. Hence, the so-called “phase-in” approved in this telephone docket was very different from the cap and deferral plan proposed by ComEd – and has no relevance to the instant case.

IV. ComEd’s petition should be dismissed.

As noted in the People’s Motion to Dismiss, the Commission is a creature of statute, and only possesses those powers expressly granted under the Public Utilities Act. *Lowden v. Illinois Commerce Comm’n*, 376 Ill. 225, 230, 33 N.E.2d 430, 433 (1941) (“the sole power of the Commission comes from the statute [Public Utilities Act]”). The Commission “has power and jurisdiction only to determine facts and make orders concerning the matters specified in the statute.” *Lowden*, 376 Ill. at 230, 33 N.E.2d at 433. The Commission has no authority to consider a proposal that is plainly not authorized by statute and clearly prohibited by the Courts.

Because the Commission cannot, as a matter of law, approve ComEd’s proposal, the Petition fails to make a request upon which relief can be granted. ComEd’s Petition should, therefore, be dismissed.

WHEREFORE, the People respectfully request that the Commission dismiss the ComEd's Petition because it fails to make a request upon which relief can be granted.

Respectfully Submitted,
The People of the State of Illinois

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August 31, 2006

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

CENTRAL ILLINOIS LIGHT COMPANY :	
d/b/a AmerenCILCO, CENTRAL :	
ILLINOIS PUBLIC SERVICE COMPANY :	
d/b/a AmerenCIPS, ILLINOIS POWER :	No. 06-0448
COMPANY d/b/a AmerenIP :	
:	
Petition for approval of deferral :	
and securitization of power costs :	

NOTICE OF FILING

PLEASE TAKE NOTICE that on August 31, 2006 the People of the State of Illinois filed a Reply in Support of the People's Supplemental Motion to Dismiss in the above-captioned proceeding via e-Docket with the Chief Clerk of the Illinois Commerce Commission at 527 E. Capitol Avenue, Springfield, Illinois 62701.

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CERTIFICATE OF SERVICE

I, Susan Hedman, hereby certify that the foregoing documents, together with this Notice of Filing and Certificate of Service, were sent to all parties of record listed on the attached service list by e-mail on August 31, 2006. Paper copies will be provided upon request.

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